

Asia Counsel Insights



Asia Counsel Insights provide an overview of key trending legal and business issues in Vietnam and how they may impact your business.

In this May 2024 edition, we provide a spotlight discussion on the implementation of law on land and new updates on the recent and draft legislations and key legislations taking effect in May.

SECTION I. RECENT LEGISLATIONS AND DRAFT LEGISLATIONS

1. Decree No. 42/2024/NĐ-CP on sea encroachment activities

On 16 April 2024, the Government issued Decree No. 42/2024/NĐ-CP on sea encroachment activities ("**Decree 42**"). Decree 42 takes effect upon its promulgation. This decree outlines the procedures governing sea encroachment projects encompassing aspects such as (i) defining the demarcated sea area for encroachment; (ii) the allocation and lease of sea and land areas; (iii) the requisite contents of a feasibility report of sea encroachment projects; (iv) the determination of land lease and land use fees, and (v) the issuance of land use right certificates.

2. Draft Decree on the implementation of the Law on Land regarding land prices

The draft decree stipulates the conditions and computation methods for four distinct approaches to determining land prices under Law on Land 2024, namely the direct-comparison method, income-based method, surplus-based method, land price adjustment coefficient method. It also sets out the procedures for formulation of annual land price brackets and specific land prices.

3. Draft Decree on the implementation of the Law on Bidding on selecting investors for projects involving land use

The draft decree outlines the scope of projects subject to tendering requirements and detailed guidance on the procedures for investor selection. The draft also stipulates various criteria in the evaluation of bidding documents across different selection methods; the criteria and methods for assessing tender submissions, and management of contingencies arising during the tendering process (such as instances where no investor has expressed interest in the project or when tender documents lack precision).

4. Draft Decree on the implementation of the Law on Cybersecurity regarding administrative penalties for violations in cybersecurity

The draft decree provides administrative sanctions for various regulatory violations in the cybersecurity sector, including breaches of personal data protection under Decree No. 13/2023/ND-CP.

SECTION II. KEY LEGISLATIONS TAKING EFFECT IN MAY 2024

1. Industrial Cluster Management and Development

On 15 March 2024, the Government promulgated Decree No. 32/2024/ND-CP concerning the management and development of industrial clusters, which came into effect on 1 May 2024. This Decree details the conditions, application, and procedures for the establishment and expansion of industrial clusters, while also stipulating the rights and obligations of production and business investment entities within these clusters.

2. New Procedures for Industrial Cluster

Following Decree No. 32/2024/ND-CP, on 10 April 2024, the Ministry of Industry and Trade issued Decision No.821/QĐ-BCT announcing new administrative procedures to establish/expand industrial clusters.

3. Safety Regulations for Information Technology and Communications Products

On 29 March 2024, the Ministry of Information and Communications issued Circular No. 02/2024/TT-BTTTT providing a list of products and goods that may expose safety risks within its scope of authority, which has taken effect from 15 May 2024.



SECTION III. SPOTLIGHT DISCUSSION – DRAFT DECREE ON THE IMPLEMENTATION OF THE LAW ON LAND

With the possibility that the new Law on Land (“**Land Law**”) taking effect in August 2024, there is an urgency to formulate and finalise the associated decrees on the implementation of the Land Law. One of the most significant decrees in this regard is the decree detailing the implementation of various articles of the Land Law, which was released in April 2024 (“**Draft Decree**”).

Proposed key changes

We have delved into the notable provisions of the Draft Decree as below.

Transparency in administrative procedures

A key aspect of the Draft Decree is its focus on enhancing transparency in land-related administrative procedures. The document provides detailed stipulations on the legal basis, conditions, and procedures on land allocation, land leasing, permission to change land use purposes, and grounds for adjusting decisions on such matters. This level of specificity is aimed at ensuring clarity for land users, particularly project developers, regarding (i) the competent authority, (ii) document requirements, (iii) procedures, and (iv) processing timeline for land administrative procedures.

Notably, the Draft Decree introduces a consultation process for projects in areas with restricted land access due to national security concerns. During the investment approval process, the People's Committee at the provincial level must seek opinions from the Ministry of National Defence, the Ministry of Public Security, and the Ministry of Foreign Affairs. This consultation needs to be completed within 20 days, and within 10 days for cases involving the acquisition of land use rights through right transfer, capital contribution or share purchase.

The Draft Decree also specifies conditions and procedures for consolidating land use purposes. In particular, developers must develop a multi-purpose use plan when consolidating land for commercial and service purposes, including information about the land plot, plan for construction and dismantling of construction works, plan to ensure national security and defence, and environmental

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protection. Land users will submit this plan and related documents to the People's Committee at the district level, and a valid and adequate application dossier will be processed within 15 days by the relevant authority.

Prioritising and ensuring land access for qualified developers

One of the key priorities of the Draft Decree is to ensure land access and land use rights for qualified developers, including foreign-invested enterprises. The document emphasizes the importance of prioritising the allocation of land funds for localities capable of attracting private and foreign direct investment. For land in industrial parks, the ability to attract domestic and foreign investment is a crucial factor in provincial and district land use planning.

This draft decree also includes specific regulations to facilitate the acquisition of land use rights for developers. For instance, it allows developers carrying out socio-economic development projects through land use rights negotiations to extend the negotiation term if initial negotiations with land users fail. This extension can occur once and must not exceed the originally approved term.

Protecting the rights of land users

Alongside the provisions aimed at ensuring land access for developers, the Draft Decree also contains scattered regulations aimed at protecting the rights of land users. For example, it stipulates that any delay by the State authorities in land procedures may be treated as a force majeure event, which will not affect the land use schedule of the projects. Such delay period would also be excluded from the grace period of up to 24 months for developers who postponed their commencement to use the land within the required timeframe.

Another instance is that in case where an awarded investor has made an advance for land compensation and recovery and the tender is cancelled, such advance will be refunded regardless of any re-tendering procedures. The refund may be provided by the new awarded investor(s) or the State budget.

Ambiguities and room for improvement

While the Draft Decree includes several progressive points, it also has certain drawbacks that are under discussion among the business community. One notable issue is the ambiguity surrounding the term “value of land use rights converted into investment capital”. This lack of clarity complicates the determination of relevant financial obligations of the shareholders where the capital contribution into a legal entity has been made by a combination of cash and other assets.

The Draft Decree remains silent on the transfer procedures as well as the conditions of the prospective transferees who may be entitled to acquire assets attached to land upon the termination of the investment projects.

Another area of concern is the definition of “cross-ownership” in the context of land or project auctions. The Draft Decree states that, if two or more companies have cross-ownership according to the Law on Enterprises, only one company can participate in the auction. However, the Law on Enterprises lacks a specific definition of cross-ownership, stating only that “*subsidiaries of the same parent company are not allowed to simultaneously contribute capital or buy shares to cross-own each other.*” The Draft Decree needs to clarify this issue, including any potential thresholds for ownership ratios and whether or not indirect ownership should also be included within the ambit of “cross-ownership”.

Furthermore, there have been concerns over the required deposit equivalent to 20% of the total value of the land plot in a land auction. This can be a significant amount for high-value land plots.

About Asia Counsel

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If you have any questions on any of the items discussed above, please do not hesitate to contact us.

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